Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-6–03 OF 2021(B)
ZAWAWI SALLEH, NALLINI PATHMANATHAN AND ZABARIAH YUSOF FCJJ
9 DECEMBER 2021

Land Law — Indefeasibility of title and interests — Unregistered interest — Respondents maintained retention pond and structures on land bought by appellant at public auction — Searches done by appellant before and after buying the land did not reveal existence of registered interest of any other party on the land title — Register document of title also did not show land had been surrendered to State Authority — Whether appellant's title and interest in the land was indefeasible and unaffected by any unregistered interest claimed by respondents — Whether respondents were liable to pay appellant damages for trespassing upon the land — Whether provisions under National Land Code to validly effect a surrender of the land to the State Authority were not complied with

The appellant bought a piece of land ('the land') at a public auction conducted by the land office on the application of the chargee of the land ('CIMB') following the failure of the land's previous owners to repay the loans they had taken from CIMB. Shortly after the purchase, the appellant discovered on the land the existence of a fenced-up retention pond surrounded by other buildings ('the structures') occupied by the first respondent. The land searches the appellant had carried out both before and after it purchased the land did not reveal the existence of any registered interest of any other party on the register document of title; nor was there any endorsement that any part of the land had been surrendered by the previous owners to the State Authority. In response to the appellant's query on why they were occupying the land, the first and second respondents ('the respondents') claimed that the pond and the structures were part of a flood-mitigation project and that that part of the land used for that purpose was surrendered by the previous owners of the land to the third respondent as a condition for being given planning permission to develop the land. The appellant demanded that the respondents demolish all the structures they had built and deliver up vacant possession of the land forthwith. When the demand was not heeded, the appellant filed suit in the High Court for an injunction restraining the respondents from trespassing on the land and for orders that they remove all the structures they had built on the land and pay damages for trespass. The respondents counterclaimed for, inter alia, a declaration that the land belonged to the State of Selangor and that it was the appellant who had to pay them damages. The High Court found in favour of

the respondents and allowed their counterclaim with damages to be assessed and dismissed the appellant's claim. The High Court held that there was sufficient evidence to show that the previous owners of the land had consented to surrendering part of the land for the construction of the retention pond to alleviate floods in a nearby residential area and that the surrender of about 14 acres of the land to the State Authority for that purpose was validly done. The Court also held that the appellant had bought the land with knowledge of the existence of the retention pond and that trespass could not arise because the land was surrendered to the State Authority before the appellant became the owner of the land. Apart from disallowing the respondents' counterclaim, the majority of the Court of Appeal ('COA') affirmed the rest of the High Court's decision and dismissed the appellant's appeal. The dissenting judge allowed the appellant's appeal and the reliefs it had prayed for on finding that: (a) the relevant provisions in the National Land Code ('the NLC') to effect and validate a surrender of land had not been complied with; (b) the register document of title to the land contained no endorsement of either a surrender as having been made or of any interest the respondents claimed in the land; and (c) the issue document of title to the land had at all material times been with CIMB. The appellant was granted leave to appeal to the Federal Court against the COA's majority decision on the question whether: (i) there was a valid surrender of any part of the land to the State Authority under s 196(1)(c) read with s 196(2)(a) of the NLC when CIMB's consent to the same had not been obtained; and (ii) if the previous owners of the land had promised to surrender the land to the State Authority (which was denied), such a promise, as an unregistered interest, could defeat the appellant's registered and indefeasible title over the whole of the land pursuant to ss 89 and 340 of the NLC. The appellant submitted that the two leave questions should be answered in the negative. The respondents, on the other hand contended, inter alia, that the appellant was bound by the caveat emptor principle and took the land subject to all the encumbrances that came with it.

Held, unanimously allowing the appeal, answering the leave questions in the negative, setting aside the COA's majority decision and affirming the decision and orders made by the minority:

(1) Every dealing or transaction of a land by a party whose interest was not registered in the register document of title could not defeat the title of the registered proprietor. A successful bidder at a public auction conducted under the NLC obtained an indefeasible title to the subject property and the unregistered interest was not protected under the NLC. The principle of indefeasibility of title was one of the main features and attributes of the Torrens System of conveyance. It involved the proposition that once a person was registered as proprietor of a certain land or interest in land, he or she acquired a title that could not be vitiated except as provided under s 340 of the NLC (see paras 31–30).

(2) The evidence before the High Court showed that the appellant had used its best efforts by conducting several land searches on the property at the land office before and after bidding for it and the results of the searches revealed that there was no encumbrance endorsed on the register document of title to the land. The appellant's efforts should be considered from an objective point of view, namely, what would a reasonable and prudent person have done to achieve the desired result, ie, whether the land had been surrendered by the previous owners to the State Authority. It was reasonable to infer from the facts that the appellant had no knowledge or reason to believe that the previous owners of the land had surrendered the land to the State Authority (see paras 37–38).

(3) In order for there to be a valid surrender, the procedure under s 200 of the NLC had to be complied with. The High Court and the majority in the COA erred in concluding that there was a valid surrender by the previous owners of the land. On the factual matrix, there was no evidence to show that any of the procedures in ss 196, 200 and 201 of the NLC had been adhered to. There was no consent in writing from CIMB as was required by s 196(1)(c) read together with s 196(2)(a) of the NLC. The surrender of any private land must be made with the consent of both the registered proprietor and the State Authority and must strictly comply with the relevant provisions of the NLC that were made for the purpose of safeguarding the interest of the registered proprietor. When those procedures were not adhered to, grave doubts would be cast on the validity/legality of the surrender. In the absence of CIMB's consent and based merely on the documents produced by the respondents, it could not be assumed that all mandatory requirements of the NLC had been adhered to when the State Authority gave its consent for the transfer (see paras 51–52).

(4) As there was no valid surrender of the land to the State, the respondents had committed trespass by the continuing presence of their structures on the land and the appellant was entitled to be awarded damages for the trespass from 20 March 2017. The trespass only occurred as from 20 March 2017 (the date the respondents neglected and/or failed to vacate the land) because the appellant's letter of demand dated 16 March 2017 gave the respondents three days to deliver up vacant possession and to remove the structures on the land (see paras 58, 60 & 63).

[Bahasa Malaysia summary

Perayu telah membeli sebidang tanah ('tanah tersebut') di dalam lelongan awam yang dijalankan oleh pejabat tanah di atas permohonan penggadai tanah ('CIMB') berikutan kegagalan pemilik tanah untuk membayar balik pinjaman oleh CIMB. Tidak lama selepas pembelian tersebut, perayu mendapati di atas tanah tersebut terdapat kolam takungan berpagar yang dikelilingi oleh bangunan lain ('struktur tersebut') yang diduduki oleh responden pertama.

Perayu telah membuat carian tanah sebelum dan selepas mereka membeli tanah tersebut dan mendapati tiada kewujudan kepentingan berdaftar mana-mana pihak lain di dalam dokumen daftar hakmilik tersebut; dan tiada mana-mana bahagian tanah tersebut telah diserahkan oleh pemilik terdahulu kepada Pihak Berkuasa Negeri. Sebagai tindak balas kepada pertanyaan perayu mengenai mengapa mereka menduduki tanah tersebut, responden pertama dan kedua ('responden') mendakwa bahawa kolam dan struktur tersebut adalah sebahagian daripada projek mitigasi banjir dan sebahagian daripada tanah yang digunakan untuk tujuan tersebut telah diserahkan oleh pemilik tanah sebelumnya kepada responden ketiga sebagai syarat diberi kebenaran merancang untuk membangunkan tanah tersebut. Perayu menuntut supaya responden merobohkan semua struktur yang di bina dan menyerahkan pemilikan tanah kosong dengan serta-merta. Apabila permintaan tersebut tidak diendahkan, perayu memfailkan saman di Mahkamah Tinggi untuk injunksi menghalang responden daripada menceroboh tanah tersebut dan untuk perintah bahawa mereka mengeluarkan semua struktur yang dibina di atas tanah tersebut dan membayar ganti rugi kerana menceroboh. Responden menuntut balas, antara lain, bahawa perisytiharan bahawa tanah tersebut adalah milik Negeri Selangor dan perayu harus membayar ganti rugi kepada mereka. Keputusan Mahkamah Tinggi memihak kepada responden dan membenarkan tuntutan balas mereka dengan ganti rugi untuk dinilai dan menolak tuntutan perayu. Mahkamah Tinggi berpendapat bahawa terdapat bukti yang mencukupi untuk menunjukkan bahawa pemilik tanah sebelumnya telah bersetuju untuk menyerahkan sebahagian daripada tanah untuk pembinaan kolam takungan untuk mengurangkan banjir di kawasan perumahan berdekatan dan bahawa penyerahan kira-kira 14 ekar tanah itu kepada Pihak Berkuasa Negeri untuk tujuan tersebut telah dilakukan secara sah. Mahkamah juga berpendapat bahawa perayu telah membeli tanah tersebut dengan pengetahuan tentang kewujudan kolam takungan dan tiada pelanggaran tersebut kerana tanah tersebut diserahkan kepada Pihak Berkuasa Negeri. Selain tidak membenarkan tuntutan balas responden tersebut, Mahkamah Rayuan ('MR') secara majoriti mengesahkan keputusan Mahkamah Tinggi yang lain dan menolak rayuan perayu. Hakim minoriti membenarkan rayuan perayu dan relief yang dipohon kerana: (a) peruntukan yang berkaitan dalam Kanun Tanah Negara ('KTN) untuk melaksanakan dan mengesahkan penyerahan tanah tidak dipatuhi; (b) dokumen daftar hakmilik tanah tersebut tidak mengandungi pengendorsan sama ada penyerahan telah dibuat atau apa-apa kepentingan responden yang dituntut di tanah tersebut; dan (c) dokumen hakmilik tanah tersebut pada setiap masa bersama CIMB. Perayu diberi kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan majoriti MR mengenai persoalan sama ada: (i) terdapat penyerahan sah mana-mana bahagian tanah tersebut kepada Pihak Berkuasa Negeri di bawah s 196(1)(c) dibacakan dengan s 196(2)(a) KTN apabila persetujuan CIMB tidak diperolehi; dan (ii) jika pemilik terdahulu tanah tersebut telah berjanji untuk menyerahkan tanah tersebut kepada Pihak

Berkuasa Negeri (yang telah dinafikan), sebarang janji, sebagai kepentingan yang tidak berdaftar, boleh membatalkan hakmilik berdaftar dan hak pemilikan tanah perayu ke atas keseluruhan tanah tersebut menurut ss 89 dan 340 KTN. Perayu mengemukakan bahawa kedua-dua soalan kebenaran merayu ke Mahkamah Persekutuan harus dijawab dalam negatif. Responden, sebaliknya berpendapat, antara lain, bahawa perayu terikat dengan prinsip emptor kaveat dan pengambilan tanah tersebut tertakluk kepada semua bebanan dan halangan di atas tanah tersebut.

Diputuskan, sebulat suara membenarkan rayuan, menjawab persoalan kebenaran dengan negative, menolak rayuan majoriti MR dan membenarkan keputusan minoriti MR:

(1) Setiap urusan atau transaksi tanah oleh pihak yang kepentingannya tidak didaftarkan dalam dokumen daftar hakmilik tidak dapat membatalkan hakmilik pemilik berdaftar. Pembida yang berjaya di lelongan awam yang dijalankan di bawah KTN memperoleh hak milik yang tidak boleh dicabar kepada tanah tersebut dan kepentingan yang tidak berdaftar tidak dilindungi di bawah KTN. Prinsip hak milik tidak boleh dicabar adalah salah satu ciri Sistem Torrens. Prinsip ini menyatakan bahawa apabila seseorang didaftarkan sebagai pemilik tanah atau kepentingan tertentu ke atas tanah tersebut, dia memperoleh hakmilik yang tidak dapat dicabar kecuali seperti yang diperuntukkan di bawah s 340 KTN (lihat perenggan 31–30).

(2) Keterangan di hadapan Mahkamah Tinggi menunjukkan bahawa perayu telah meletakkan usaha terbaiknya dengan melakukan beberapa carian tanah ke atas harta tersebut di pejabat tanah sebelum dan selepas bidaan tanah tersebut dan hasil carian mendedahkan bahawa tiada bebanan atau halangan di atas dokumen daftar hak milik tanah tersebut. Usaha perayu perlu dipertimbangkan dari sudut objektif, iaitu, mana-mana orang munasabah akan melalukan perkara tersebut untuk melihat sama ada tanah tersebut telah diserahkan oleh pemilik terdahulu kepada Pihak Berkuasa Negeri. Adalah munasabah untuk membuat kesimpulan dari fakta tersebut bahawa perayu tidak mempunyai pengetahuan atau alasan untuk mempercayai bahawa pemilik tanah sebelumnya telah menyerahkan tanah tersebut kepada Pihak Berkuasa Negeri (lihat perenggan 37–38).

(3) Untuk menjadikan penyerahan tanah tersebut dilakukan secara sah, prosedur di bawah s 200 KTN perlu dipatuhi. Mahkamah Tinggi dan majoriti di dalam MR telah terkhilaf di dalam menyimpulkan bahawa terdapat penyerahan yang sah oleh pemilik tanah sebelumnya. Fakta menunjukkan bahawa, tiada bukti menunjukkan bahawa prosedur dalam ss 196, 200 dan 201 KTN telah dipatuhi. Tiada persetujuan secara bertulis dari CIMB seperti yang dikehendaki oleh s 196(1)(c) dibaca

bersama-sama dengan s 196(2)(a) KTN telah diperoleh. Penyerahan tanah persendirian mesti dibuat dengan persetujuan kedua-dua pemilik berdaftar dan Pihak Berkuasa Negeri dan mestilah mematuhi peruntukan di dalam KTN yang berkaitan untuk tujuan menjaga kepentingan pemilik berdaftar. Apabila prosedur tersebut tidak dipatuhi, keraguan yang serius akan timbul mengenai keesahan penyerahan tanah tersebut. Dengan ketiadaan persetujuan CIMB dan hanya berdasarkan dokumen yang dikemukakan oleh responden, tidak dapat diandaikan bahawa semua keperluan mandatori KTN telah dipatuhi apabila Pihak Berkuasa Negeri memberikan persetujuannya untuk penyerahan tanah tersebut (lihat perenggan 51–52).

(4) Oleh disebabkan penyerahan tanah tersebut kepada Negeri adalah tidak sah, responden telah melakukan pelanggaran dengan pembinaan struktur yang berterusan di atas tanah tersebut dan perayu berhak diberikan ganti rugi di atas pencerobohan dari 20 Mac 2017. Pencerobohan tersebut hanya berlaku pada 20 Mac 2017 (tarikh responden mengabaikan dan/atau gagal mengosongkan tanah) kerana surat tuntutan perayu bertarikh 16 Mac 2017 telah memberikan responden tiga hari untuk menyerahkan pemilikan kosong dan untuk membuang struktur mereka di atas tanah tersebut (lihat perenggan 58, 60 & 63).]

Cases referred to

Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Wong Phuan Foo [1990] 1 CLJ Rep 615, HC (refd)

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener) [1989] 1 MLJ 381, HC (refd)

ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor [2020] MLJU 516, CA (refd)

Efobi v Royal Mail Group Ltd [2021] UKSC 33, SC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650, SC (refd)

Hadland Arthur John & Anor v Audra Elaine Gomez [2014] 2 MLJcon 99, HC (refd)

Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal [2020] 6 MLJ 594, CA (refd)

Mohd Zuhairi bin Zakaria v Rosni Anita bt Ariffin & Anor [2020] MLJU 1724, HC (refd)

One Visa Sdn Bhd v Telekom Malaysia Bhd [2015] 7 MLJ 104; [2015] 10 CLJ 569, HC (refd)

Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)

QM Resources Sdn Bhd v Parade Hotel Sdn Bhd & Ors [2020] 5 MLJ 660; [2020] 5 CLJ 182, CA (refd)

Richard Curtis & Co Sdn Bhd v Khatijah Abdul Majid [2012] 7 CLJ 878, HC (distd)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal [2021] 5 MLJ 759; [2021] 6 CLJ 650, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24, HC (refd)
Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645, CA (refd)
Yap Lai Yoke v Chin Fook Wah & connected case [1984] 2 MLJ 274, FC (refd)
Yee Fatt Motors Enterprise (Segamat) Sdn Bhd v Director, Johor Road Transport Department & Ors [2021] MLJU 1814, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Federal Constitution art 13
National Land Code ss 89, 124, 135, 136, 137, 138, 139, 146, 147, 148, 149, 150, 196, 196(1)(c), (2)(a), 200, 201, 204A, 204B, 204C, 204D, 204E, 204F, 204G, 204GA, 204H, 259(3A), 267(1), 340, 341, 450, Form 11B
Rules of Court 2012 O 18 r 19

Appeal from: Civil Appeal No B–01(NCVC)(W)-328–05 of 2018 (Court of Appeal, Putrajaya)

Leong Wai Hong (Richard Kok, Karen Tan and Tan Ko Xin with him) (Rhiza & Richard) for the appellant.
Nur Irmawatie bt Daud (Muhammad Haziq Hashim with her) (Selangor State Legal Advisor's Office) for the respondent.

Zawawi Salleh FCJ:

INTRODUCTION

[1] This appeal requires us to consider important questions that go to the heart of the land registration under the Torrens System. One of the central issues is whether a successful bidder at the auction sale under the National Land Code ('the NLC') must recognise the interest of a person or a body not registered against the title to the land now duly registered in the successful bidder's name. Put another way, the question is whether a promise by the previous owner to surrender the land to the State of Authority of Selangor is binding on the appellant, a successful bidder at the auction under the NLC, who has not at any time consented to the fenced-off lake and its related structures for flood mitigation to be on the land now duly registered in his name.

[2] On 16 February 2021, this court granted leave to the appellant to appeal against the majority decision of the Court of Appeal on the following two questions of law:

(i) Assuming that Subject Land Lot 18903 was the agreed lot to be surrendered to Majlis Perbandaran Shah Alam which is denied) whether the right of the appellant as the registered owner under sections 89 (conclusiveness of register documents of title) and 340 of the NLC (registration to confer indefeasible title) can be defeated by a promise to surrender the said property made by the Previous Owners; and

(ii) Assuming that Subject Land Lot 18903 was the agreed lot to be surrendered to Majlis Perbandaran Shah Alam (which is denied) whether there was a valid surrender of Subject Land Lot 18903 under sections 196(1)(c) read with 196(2)(a) of the NLC when the consent of the chargee had not been obtained.

FACTUAL BACKGROUND AND ANTECEDENT PROCEEDINGS

[3] The facts germane to this appeal may be stated as follows:

(a) the subject matter in dispute in this appeal is Lot PT 18903, HS(M) 20109, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang measuring 17.49 acres ('the land'). The land was previously jointly owned by Newacres Sdn Bhd and Bumi-Murni Sdn Bhd ('the previous owners');

(b) on 25 March 2011, the land was purchased by the appellant for RM3.66m through a public auction conducted by the Klang Land Office. The said public auction was held on the application of the chargee, CIMB Bank Bhd ('CIMB'), after the previous owners defaulted in their loans with CIMB;

(c) sometime in July 2011, the appellant engaged a licensed land surveyor to conduct a survey of the land, and it revealed that there is a retention pond on the said land and other permanent structures (Tenaga Nasional Bhd's substation, staff quarters, huts and storeroom) built surrounding it, being 9.554 acres out of 17.49 acres;

(d) the appellant then wrote a letter dated 27 September 2013 to the first and second respondents requesting for information and documents to justify the respondents' occupation of the land. In response to the appellant's letter, the first respondent vide a letter dated 25 October 2013 explained that they were in the process of collecting the relevant documents and information with regards to the project and the retention pond, and that a meeting would be held once the relevant documents and information were obtained;

(e) nonetheless, there is no indication that the retention pond and the structures were built on the land neither did it indicate that the portion of the land had been surrendered to the respondents by the previous owners when the appellant conducted a search prior to the judicial sale. On 4 May 2011 (after the public auction), the appellant carried out another land search with the same result. The appellant thereafter conducted two land searches on 30 November 2016 and 11 May 2017 and found that the respondents' interest was not registered in the register document of title and there was no record of any surrender of the land to the state;

(f) by a letter dated 11 September 2014, the first respondent wrote to Klang Land Administrator to apply to enter a Registrar's Caveat on the land and the caveat was subsequently entered on 19 September 2014;

(g) on 10 December 2014, the appellant filed a discovery application in the Shah Alam High Court via Originating Summons No 24-1381–12 of 2014 against the first and second respondents requesting them to provide the necessary documents to justify the respondents' occupation on the land. The High Court allowed the application on 23 July 2015;

(h) the respondents lodged a police report on 11 March 2015 stating that they were unable to locate the project file namely 'Project Rancangan Tebatan Banjir Taman Sri Muda Seksyen 25 Shah Alam' and intended to gather documents and plans from Majlis Bandaraya Shah Alam ('MBSA');

(i) the first and second respondents then produced the following documents to support their claims that the portion of the land was surrendered to the third respondent:

(i) a copy of official search and Form 11B for the land;

(ii) a letter dated 16 September 1996 from Newacres Sdn Bhd to Majlis Perbandaran Shah Alam;

(iii) site plan, location plan and source plan; and

(iv) layout plan dated 8 June 2006.

(j) the appellant's solicitor subsequently issued a letter of demand dated 16 March 2017 to the first respondent for, inter alia, delivery of vacant possession of the land and removal of the fence and structures within three days.

THE HIGH COURT

[4] As a result of the respondents' failure to comply with the appellant's demand, the appellant then proceeded to file the suit in the High Court on 20 March 2017. However, on 26 October 2017, the respondents filed an application to strike out under O 18 r 19 of the Rules of Court 2012 but such application was withdrawn, and the matter proceeded for trial.

[5] In the High Court, the appellant sought the following reliefs:

(a) an injunction restraining the respondents from trespassing;

(b) an order that the respondents remove the fence and/or other structures and restore the land to the condition in which it was before such fences and/or structures were erected or constructed;

(c) an order that the respondents, jointly or severally, pay damages for trespass on the land from 25 March 2011 or a date the court deems fit to the date the respondents cease trespass; and

(d) interest and cost.

[6] On the other hand, the respondents filed a counterclaim against the appellant and sought the following reliefs:

(a) a declaration that the land belongs to the State of Selangor;

(b) an order that the respondents are entitled for damages and the appellant to bear the construction cost of the retention pond;

(c) exemplary damages; and

(d) interest and cost.

[7] The respondents justified the occupation of the land based on the following documents:

(a) a letter dated 21 August 1996 from Messrs YY Woo Arkitek ('YYW') to MBSA where the previous owners, had appealed against a reduction in 'density' by stating that 41% of the project, ie a portion of a land measuring 14 acres had been surrendered to build a retention pond;

(b) a letter dated 16 September 1996 to MBSA from the previous owners stating that the previous owners had agreed to build and surrender the retention pond to MBSA for maintenance thereafter, as a condition to receive planning permission;

A (c) a letter dated 24 July 1997 from Ahmad Zamri bin Kamaruddin, Ketua Jabatan Perancang Bandar of MBSA to YYW informing that MBSA has imposed a condition for the construction of a retention pond for development on Lot 18908;

B (d) the layout plan of 'Cadangan Pembinaan Kediaman, Asrama, Kompleks Sukan dan Kolam Tadahan Air di atas Lot 38618' was approved on 26 September 1996 and registered on 18 July 1997; and

(e) a letter by MBSA dated 20 April 2006 in respect of planning permission on Lot 38618.

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[8] The High Court found in favour of the respondent. Consequently, the appellant's claim was dismissed and the respondent's counterclaim was allowed with damages to be assessed.

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[9] The essence of the High Court's reasoning may be summarised as follows:

(a) the High Court was satisfied that there was sufficient evidence to support that *the previous owners had given their consent and permission to surrender part of the land* for the purpose of constructing the retention pond to prevent the recurrence of flood in Taman Sri Muda area. The appellant did not dispute the letter dated 16 September 1996 which states that the previous owners had undertaken to build the retention pond at their costs and upon completion, the same will be handed over to the local authority. Although the said letter refers to Lot 18909 and not Lot 18903, the previous owners did not object as to the construction of the retention pond at the proposed area on the land;

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F

G (b) the High Court also found that there was a valid surrender of the land (approximately 14 acres) to build the retention pond and other structures, as supported by a letter issued to the appellant dated 5 July 2016 confirming the planning permission on the land in which it is still enforceable since the retention pond has been built as per the planning permission;

H

(c) as regards to the issue whether the appellant is subject to cl 18 of the proclamation of sale, which is reproduced as follows:

I

> Hartanah ini adalah dipercayai dan hendaklah dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua ismen, kaveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya tanpa apa-apa tanggungan yang timbul untuk mengtakrifnya dan tiada kesilapan, pernyataan khilaf atau perihal khilaf boleh membatalkan jualan ini dan tiada bayaran gantirugi dibenarkan mengenainya.

The High Court was of the view that the terms and conditions in the proclamation of sale are not applicable to the respondents on the basis that it is a contract between CIMB and the appellant. Furthermore, it was also held that the auction sales contract is based on 'as is where is' basis in relation to the appellant's purchase of the land according to its existing condition. The proclamation of sale stated under the heading 'The Location and Description of the Property' that there is a retention pond which covered a major part of the subject property. As such, the High Court held that the appellant has full knowledge and even accepted the location and description of the land including the retention pond which covered the major part of the land that has been surrendered to the State Authority of Selangor. This conclusion is supported by the following facts:

(i) the appellant admitted that it is aware about the retention pond in the proclamation of sale since before the auction; and

(ii) the appellant's knowledge was manifested by a letter dated 15 April 2013 when the land surveyor engaged by the appellant requested permission from the respondents to have access to the retention pond area for the purpose of site visit. This indirectly demonstrates that the appellant has acknowledged the ownership of the respondents;

(d) the respondents could not be said to have committed trespass since it was held that the part of the land consisting of the retention pond and structures was validly surrendered to the respondents;

(e) the issue of the counterclaim is no longer relevant as there was a valid surrender of part of the land; and

(f) the issue of ownership and trespass does not arise because the surrender of part of the land was finalised before the land was registered under the appellant. Consequently, the High Court allowed the counterclaim for the reliefs sought.

THE COURT OF APPEAL

[10] Dissatisfied with the High Court's judgment, the appellant appealed to the Court of Appeal.

[11] In gist, the issue before the Court of Appeal is whether the respondents had committed trespass by wrongly entering and proceeding to construct the retention pond on the wrong lot and the validity of surrender of the land by the previous owners to the State Authority.

[12] In its 2:1 verdict, the Court of Appeal dismissed the appellant's appeal. Justice Hasnah Mohamed Hashim JCA (Justice Kamaludin Md Said JCA concurring) held that:

(a) the appellant's claim against the respondent for trespass and for damages is without basis and cannot be sustained; and

(b) there was a valid surrender of the land measuring approximately 14 acres by the previous owners to the third respondent to build the retention pond and the structures.

[13] As regards to the counterclaim, the majority was satisfied that it had not been proven sufficiently by the respondents, and therefore damages were not awarded. The majority reasoned:

(a) since the land has been surrendered to the third respondent and under its supervision and maintenance, the construction cost and maintenance of the retention pond and the structures must necessarily be borne by the third respondent; and

(b) the award of damages, interests and costs as decided by the High Court are set aside because the claims have not been proven sufficiently by the respondents.

[14] Justice Lee Swee Seng JCA, the third judge on the bench, penned a dissenting judgment. His Lordship allowed the appellant's appeal and held that the respondent's flood mitigation lake related structures on the land duly registered in the name of the appellant constitute a trespass and that in any event compensation is payable by the respondents to the appellant for the presence of the lake (fenced-off/by the respondents) and its related structures on the appellant's land. The damages for trespass or alternatively compensation was ordered to be paid by the defendants jointly and severally to the appellant. The compensation shall be assessed by the High Court.

FEDERAL COURT

[15] Aggrieved with the majority decision, the appellant appealed to this court by way of leave. The appellant sought for the following reliefs in the event that this appeal is allowed:

(a) the order of the Court of Appeal dated 24 August 2020 be set aside with costs;

(b) an order that the respondents, jointly and/or severally, pay damages for trespass on the land or any part thereof from 25 March 2011 (date the appellant bought the land) to the date the respondents cease trespass;

(c) interest at the rate of 5%pa to be paid by the respondents, jointly and/or severally, on all damages awarded from 20 March 2017 (date of the writ) to the date of full payment; and

(d) costs at the Federal Court, Court of Appeal and High Court be awarded to the appellant.

PARTIES' COMPETING SUBMISSIONS APPELLANT'S SUBMISSION

[16] Learned counsel for the appellant submitted that the first and second leave questions should be answered in the negative based on the following grounds:

(a) first leave question:

(i) the register document of title is conclusive evidence of ownership which defeats all prior unregistered claims based on the accepted principle of Torrens System adopted in Malaysia;

(ii) the respondents' unregistered interest cannot defeat the indefeasible interest of the registered chargee (CIMB) and correspondingly the indefeasible interest of the successful bidder under a public auction pursuant to ss 259(3A) and 267(1) of the NLC . Reliance was placed on the following cases:

(1) the Supreme Court in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 at p 651 and the Court of Appeal in *QM Resources Sdn Bhd v Parade Hotel Sdn Bhd & Ors* [2020] 5 MLJ 660 at pp 675–676 and 679; [2020] 5 CLJ 182 at pp 197–198 and 200 at paras 45–47 and 49 and 57 which held that a successful bidder at a public auction conducted under the NLC obtains an indefeasible title to the subject property — through the chargee whose interest under the charge is indefeasible, and prevails over unregistered interests;

(2) the Federal Court in *Yap Lai Yoke v Chin Fook Wah & connected case* [1984] 2 MLJ 274 at p 276 which held that adverse possession of a land by a party whose interest is unregistered cannot defeat the title of the registered proprietor; and

(3) the High Court in *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener)* [1989] 1 MLJ 381 at p 382 and *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Wong Phuan Foo* [1990] 1 CLJ Rep 615 at p 616 which held that the registration of charge has the effect of defeating the prior unregistered claims of the interveners.

(b) second leave question:

(i) it is a mandatory requirement under s 196(1)(c) read with s 196(2)(a) of the NLC (conditions for approval of surrender) that consent in writing in respect of the CIMB charge must first be obtained before the previous owners can surrender the land to the third respondent; and

(ii) it is an undisputed fact that there was no consent in writing has been obtained by the previous owners from CIMB to surrender the land to the third respondent.

RESPONDENT'S SUBMISSION

[17] In reply, the respondents submitted that the land has been surrendered by the previous owners to the respondents to obtain approval for planning permission from MBSA. It was evident through several documents enumerated in para [7] of this judgment.

[18] It was further submitted by learned counsel for the respondents that the retention pond existed before the transfer of the land to the appellant and the land was even being surrendered by the previous owners before it was being charged to CIMB. Hence, there is no necessity to obtain CIMB's approval.

[19] Learned counsel for the respondents further contended that:

(a) the appellant failed to exercise caveat emptor principle and refer us to High Court's case of *Richard Curtis & Co Sdn Bhd v Khatijah Abdul Majid* [2012] 7 CLJ 878;

(b) sale and purchase of land through public auction should be distinguished from the ordinary sale as the successful bidder is subjected to encumbrances on the land; and

(c) the appellant is subjected to cl 18 of proclamation of sale and reliance was placed on the case of *One Visa Sdn Bhd v Telekom Malaysia Bhd* [2015] 7 MLJ 104; [2015] 10 CLJ 569.

ANALYSIS AND FINDINGS

[20] Before we proceed to consider the leave questions, it may be helpful, to put things in context, to state briefly the mechanism of surrender and re-alienation of land in Malaysia. Surrender and re-alienation is one of the mechanisms to fasten land development procedure as stated under ss 204A–204H of the NLC. It involves a process of modification or variation of conditions, restrictions and categories of land through s 124 of the NLC that can be done simultaneously with subdivision (ss 135–139) or amalgamation (ss 146–150). District Land Office is responsible to manage the process until the

land is registered under the name of the landowner on the document of title. This procedure is supported by various agencies and professional ie registered surveyor, planner, State Authority, Land and Mines Office, etc. The objective of the mechanism is to expedite the development procedure in timely manner.

[21] Section 204B of the NLC defines surrender and re-alienation as surrendering the whole or more adjoining land held under final or qualified titles or combination thereof, owned by the same landowners, provided that part of the land will be re-alienated to the State Authority to the landowner in the form of different parts or unit. The purpose of surrendering the land is to allow State Authority to convert the land category in accordance with the development plan *gazetted* by the government, for example from agriculture to building or industry. Then, the land will be subdivided or amalgamated (depending on the development purpose) before the State Authority re-alienates the land to the landowner to allow the development to take place. As stated earlier, this process will shorten the process of variation of conditions and categories of land which can be executed simultaneously with the process of subdivision or amalgamation according to ss 204A–204H of the NLC (see the Hansard of Parliament dated 6 April 1984 and Amirul Haffiz Ariff, Salfarina Samsudin, Mohd Hamdan Ahmad, *Surrender And Re-Alienation Approval Process: A Review Of Emerging Issue And Way Forward From Evidence Base*, Journal of Critical Review, Vol 7, Issue 16, 2020 [SSN-2394–5125]).

FIRST LEAVE QUESTION

[22] The first leave question is premised upon an assumption that the land which is Lot 18903 was the agreed lot to be surrendered to Majlis Perbandaran Shah Alam although the appellant denied this. The crux of the matter is whether the promise to surrender the land by the previous owner prior to the charge of the said land to CIMB and the transfer of the same to the appellant is valid in law or it is in contravention of ss 89 and 340 of the NLC.

[23] The High Court and the majority, relying on the documents produced by the respondents and caveat emptor principle, came to the conclusion that there was a valid surrender of the land by the previous owners to the third respondent to build the retention pond and the structures.

[24] Learned counsel for the appellant mounted an attack against the majority on the following grounds:

(a) it contradicts with the settled principle of land law under the Torrens System that a register document of title is conclusive evidence of ownership which defeats all prior unregistered claims and avoids the

need for any person dealing with the land to have to go behind the register document of title to investigate and ascertain the validity of the title;

(b) the documents produced by the respondents do not support the respondents' allegation that the land has been surrendered by the previous owners;

(c) the majority failed to draw an adverse inference against the respondents for their failure to call any witnesses from the previous owners to prove their defence; and

(d) the majority's reliance on the High Court's case of *One Visa Sdn Bhd v Telekom Malaysia Bhd* [2015] 7 MLJ 104; [2015] 10 CLJ 569 was misplaced because the case is not applicable to the present case as it is not a case on a dispute regarding ownership of a land between a registered proprietor and a party who claims to have interests in the land that are not registered.

TORRENS SYSTEM AND INDEFEASIBILITY OF TITLE

[25] The nub of the appellant's submission on the first leave question is that assuming there was a promise to surrender the land made by the previous owners/(which is denied), such a promise was an unregistered interest which cannot defeat the registered and indefeasible title of the appellant by virtue of ss 89 and 340 of the NLC relating to the conclusiveness of register documents of title and indefeasibility of title.

[26] In this regard, the two most significant statutory provisions are ss 89 and 340 of the NLC:

Section 89

89 Conclusiveness of register documents of title

Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —

(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.'

Section 340

340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[27] It is trite that land law in Malaysia is based on title and interest by registration which is derived from the Torrens System. There are two fundamental principles of the Torrens System, namely the mirror principle and the curtain principle. The mirror principle portrays a concept in which the land title mirrors all relevant and material details that a perspective purchaser, lessee and chargee ought to know. This mean that a person can obtain all such material information of the land, based on what is endorsed on the register of document of title and issue document of title. On the other hand, the curtain principle is a concept that dispenses with the need to look beyond the register — as the land itself provides all relevant information reflecting the validity of the same. Ostensibly, the 'curtain' is where the principle took its name from.

[28] In the case of *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645 ('Yap Ham Seow'), Raus Sharif PCA (as His Lordship then was) sitting in the Court of Appeal explained on the issue of

ownership as recognised by s 89 of the NLC as follows:

> [41] Under the circumstances, we are inclined to agree with the fourth defendant's contention that *it is the person who is named in the register document of title as the proprietor is the one who is recognised by s 89 of the NLC … In determining ownership as in the instant case the court should not be concerned with how the fourth defendant got his name onto the register document of title or whose interest takes priority over the other. Rather, for us the question of critical importance at the end of the day so far as the issue of ownership is concerned boils down to this: Whether the interest of the fourth defendant as the registered proprietor whose name is in the register document of title is indefeasible. This is indeed the thrust of the second issue in the fourth defendant's appeal.* (Emphasis added.)

[29] In the case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553, Azahar Mohamed FCJ (now CJM) had succinctly discussed the legal position of s 89 of the NLC and adopted the proposition in *Yap Ham Seow* as follows:

> [146] Now, once the scheme of the provisions of s 89 is seen, it is apparent that *since the register document of title is conclusive evidence of ownership and in the present instance since the register document of title bears the name of the first defendant as the registered proprietor, it follows and becomes conclusive evidence that the first defendant is the registered proprietor unless defeasible pursuant to s 340 of the NLC. What appears on the registered document of title is conclusive as the register is everything under the Torrens System.* In *Gibbs v Messor & Co* [1891] AC 248, Lord Watson said:
>
> > The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.
>
> [147] *In the case of Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7, it was held that 'the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant'. *The concept of indefeasibility of title under s 89 of the NLC applies to the person whose name currently appears as the proprietor on the register document of title and not to a former registered proprietor* (see *Yap Ham Seow*).
>
> [148] As pointed out by Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd Ed) at pp 182–183:
>
> > *Under the Torrens system, it is the act of registration that vests title or interest; once registered, the title or interest cannot be divested except otherwise statutorily provided. Registration is the cornerstone of the Torrens system.* It is not a system of registration or recordation of title, under which what are registered are existing titles or interests; registration under such system does not vest or divest any title or interest. *Under the Torrens system, the registered title or interest is also free of all adverse claims or encumbrances not otherwise noted on the register. The effect of*

> *registration is to defeat all prior and subsequent unregistered claims. Under this system, and as underscored by section 89 of the Code, the register is all important and conclusive evidence that the title is vested in the person or body for the time being named as the proprietor and that the land is subject to such conditions, restrictions in interest and other provisions as specified in the title.* Theoretically, this is known as the 'indefeasibility of title', which is reflected in section 340 of our Code under which it is provided that registration confers an indefeasibility title or interest, until and unless that title or interest is challenged or set aside on any of the grounds set out under section 340(2). (Emphasis added.)

[30] It is pertinent to note that the principle of indefeasibility of title is one of the main features and attributes of the Torrens System of conveyance. It involves the proposition that once a person is registered as proprietor of certain land or interest in the land, he or she acquires a title that cannot be vitiated except as provided under s 340 of the NLC. Therefore, s 450 complements s 89 (*See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal* [2021] 5 MLJ 759; [2021] 6 CLJ 650; *Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal* [2020] 6 MLJ 594).

[31] In the premises, we agree with the submission of learned counsel for the appellant that a successful bidder at a public auction conducted under the NLC obtains an indefeasible title to the subject property and the unregistered interest is not protected under the NLC. Every dealing or transaction of a land by a party whose interest is unregistered in the register of document cannot defeat the title of the registered proprietor.

CAVEAT EMPTOR

[32] We now turn to the issue of caveat emptor. Learned counsel for the respondents submitted that the appellant was careless in bidding the land since the appellant knows about the auction only a day before it and rely solely on the property agent appointed by them. In support of his submission, learned counsel for the respondent refers us to the High Court's judgment in *Richard Curtis & Co Sdn Bhd v Khatijah Abdul Majid* [2012] 7 CLJ 878 ('Richard Curtis') as follows:

> [60] However the plaintiff chose not to inquire about the size of the subject land. The maxim caveat emptor 'let the buyer beware' requires that the plaintiff as the purchaser to be cautious as the risks was his and not that of the defendant. A prudent step or precaution to be undertaken by a purchaser such as the plaintiff was to make a survey of the subject land to ascertain its size. However, if the plaintiff opted not to take this precaution it could not now fault the defendant for the shortfall in the size of the subject land. Hence the principle of caveat emptor and or 'let the buyer beware' would apply to the factual matrix of this case.

[33] Per contra, learned counsel for the appellant argued that the above case is not applicable because it is a case on a buyer suing a vendor for misrepresentation on the size of the land.

[34] We agree. We have carefully examined the case of *Richard Curtis*. In this particular case, the plaintiff bought the land from the defendant and alleged that the defendant had only delivered land measuring 3003 square meters instead of 3,602sqmt as stated in the agreement. One of the issues arose was whether the principle of caveat emptor applies. In that case, the subject land is under qualified title and the actual area of the subject land had not been surveyed and approved by the Director of Survey and Mapping Department. Hence, the principle of caveat emptor is applicable as the plaintiff could not now fault the defendant for the shortfall in the size of the subject land after failing to take precaution itself.

[35] The facts in this instant appeal are poles apart from *Richard Curtis'* case. The land in *Richard Curtis* case is under qualified title and therefore the actual measurement of the land cannot be ascertained at the point of sale and purchase. The issue before the court in that case is also different from our case. The underlying issues posed for our determination in the present case are relating to the indefeasibility of title and the validity of the surrender of the land by the previous owners to the State Authority.

[36] What is the principle of caveat emptor? The legal maxim of caveat emptor has been explained extensively by the majority. It is unprofitable exercise to regurgitate the same. Simply put, the principle of caveat emptor can be summarised as follows:

(a) 'caveat emptor' means 'let the buyer beware'. The rule is that a purchaser should make inspection and inquiry as to that which he is proposing to buy. If a property is being sold on an 'as is where is' basis, this means that it is being sold in its current condition, whatever this condition happens to be;

(b) the principle of caveat emptor is applicable in a case of disclaimer of warranty as to the quality, nature, condition and/or defects of the property sold; and

(c) the principle of caveat emptor will not assist the defendants who do not have any rights, title, interest and/or benefit in the property.

(See *Yee Fatt Motors Enterprise (Segamat) Sdn Bhd v Director, Johor Road Transport Department & Ors* [2021] MLJU 1814, *Mohd Zuhairi bin Zakaria v Rosni Anita bt Ariffin & Anor* [2020] MLJU 1724, *Hadland Arthur John & Anor v Audra Elaine Gomez* [2014] 2 MLJcon 99.)

[37] In this instant appeal, we observed that the appellant did not inspect the site based on the statement given by the PW1 that the appellant's agent only informed the appellant about the auction a day before it. Nevertheless, even if the appellant takes steps to inspect the site and later discovered that big portion of the land was covered with the retention pond and the structures, the ownership on the paper (register document of title) as revealed in the land searches conducted by the appellant remains unchanged. In addition, given the fact that the respondents took few months to revert on the status of the land and the file for the project went missing, it is reasonable to infer that the appellant had no knowledge or reason to believe about the alleged surrender of the land by the previous owners to the State Authority.

[38] The evidence adduced before the High Court showed that the appellant had use it best efforts by conducting several land searches on the property at the Land Office before and after bidding for it and the results of the searches revealed that there was no encumbrance endorsed on register document title of the land. In our view the efforts on the part of the appellant should be considered from an objective point of view, namely what would a reasonable and prudence person have done to achieve the desired result ie whether the land had been surrendered by the previous owner to the State Authority.

AS IS WHERE IS BASIS

[39] Undaunted, learned counsel for the respondents advanced further argument that the appellant is subjected to cl 18 of proclamation of sale, relying on the case of *One Visa Sdn Bhd v Telekom Malaysia Bhd* [2015] 7 MLJ 104; [2015] 10 CLJ 569 as to the basis of 'as is where is'.

[40] On the contrary, learned counsel for the appellant contended that the above case is not applicable to the present case, because it is not a case on a dispute regarding ownership of a land between a registered proprietor and a party who claims to have interests to the land that are not registered. Rather the issue in the above case was whether the defendant is liable for trespass and damages for removing the infrastructure from the plaintiff's lands without the plaintiff's knowledge.

[41] We agree with the submission of learned counsel for the appellant. The case at hand is regarding validity of the surrender of the land and the appellant did not dispute on the condition of the land. Hence, the issue on the basis of 'as is where is' has no bearing on the outcome of the present case.

ADVERSE INFERENCE

[42] Now, we turn to the issue of adverse inference. Relying on s 114(g) of the Evidence Act 1950, the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 and the minority judgment, it was argued by the learned counsel for the appellant that an adverse inference must be drawn against the respondents on their failure to call any witnesses from the previous owners to prove that the land was indeed surrendered by the previous owners.

[43] Our short answer to this argument is this. It is well established principle that the trial judge has the discretion whether or not to draw an adverse inference from the absence of a witness and this will depend on whether they were central or crucial to the issues to be decided. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, the United Kingdom Supreme Court referred to 'a risk of making overly legal and technical what reality is or ought to be just a matter of ordinary rationality'. The court observed that tribunals should be free to draw, or decline to withdraw, inferences 'using their common sense without the need to consult law book when doing so'. Whether a failure to give evidence was significant would depend entirely on the context and particular circumstances, including for example whether the witness was available to give evidence, what other evidence there was on those points, and the significance of those points in the context of the case.

[44] We are of the view, in the context of the present case, irrespective of whether or not the previous owners are being called to testify, the statement given by them is immaterial since the appellant has an indefeasible title as the appellant's name is duly registered in the document of title.

CONSENT OF THE CHARGEE

[45] Learned counsel for the appellant submitted that the majority had erred on the ground that they had failed to consider the undisputed facts that the land had a charge registered in favour of CIMB and no consent in writing of the chargee has been obtained by the previous owners to surrender the land to the third respondent.

[46] Per contra, learned counsel for the respondents contended that CIMB's approval is not needed for the surrender because part of the land has been surrendered by the previous owners since 1997 ie before it was charged to CIMB on 4 August 1999.

[47] Thus, the issue to be addressed is whether there was indeed a valid surrender of the land under s 196(1)(c) read with 196(2)(a) of the NLC when

the consent of the chargee had not been obtained (upon the assumption that the land was the agreed lot to be surrendered).

[48] The minority came to the conclusion that there was no valid surrender of the land to the State Authority of Selangor. The basis for minority's decision is set forth in the following paragraphs of the judgment:

> [75] *It would be something rather basic that the state must take possession of the title to the land if at all there was to be a first step towards an effective surrender of the land to the state. It was not asked for as the title was with the bank as any search on the title would reveal.*
>
> [76] *There can be no effective, valid and legal surrender of the land without complying with the requisite provisions of ss 195–204H of the NLC.* There is no such thing as an equitable surrender; at least not one that is binding on the plaintiff and anyone that later would become the subsequent proprietor to the land. As submitted by learned counsel for the plaintiff there was no endorsement for more than 20 years since 1996 when the alleged surrender took place. The plaintiff wanted to be very sure that it was not seeing the wrong entries against the said land title and so did no less than four searches from 2009–2017 to ascertain the status of the said land to be free from all encumbrances and to be assured of its position in law.
>
> [77] The searches were carried out on 15 July 2009 (appeal record, Vol 3A, pp 446–447), on 4 May 2011 (appeal record, Vol 3A, pp 448–450), on 30 November 2016 (appeal record, Vol 3A, pp 497–500) and on 11 May 2017 (appeal record, Vol 3A, pp 382–383).
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> [78] All the searches unmistakably showed that the defendants' interest in the lake and its structures were not registered against the land's register document of title and there was no record of any surrender of the land to the state ...
>
> [85] *The surrender of the land, assuming for a moment that there was such an intention by the previous proprietors and the defendants, was not followed through by the parties and indeed no evidence of it having been commenced and continued to completion with the title of the land being surrendered to the state and the relevant endorsement made against the title.*
>
> [86] The chargee bank CIMB Bank was still keeping the issue document of title which it had to deposit with the land administrator before the auction could proceed and upon completion of the auction sale and the payment of the bid price the issue document of title is then released to the successful bidder who had paid the bid price in accordance with the memorandum of sale. After the land administrator had issued the certificate of sale under the NLC, the title to the land would be registered in the name of the successful bidder, as indeed it had been so registered since 3 October 2011. (Emphasis added.)

[49] We shall explain why we agreed with reasons given by the minority.

[50] For convenience, we reproduce the relevant statutory provisions:

> 196 Conditions for approval of surrender

A (1) No surrender, whether of the whole or a part only of any alienated land, shall be approved by the State Director or, as the case may be, Land Administrator unless the following conditions are satisfied —

(a)–(b) ...

B (c) that every person or body specified in sub-section (2) has consented in writing to the making of the application.

(2) The said persons and bodies are —

(a) any person or body who, at the time when the approval was applied for, was entitled to the benefit of any registered interest affecting the land or, as the case may C be, the part to be surrendered (including a charge of any lease or sub-lease);

(b)–(d) ...

...

200 Applications for approval of surrender of part

D (1) Any application for approval by a proprietor wishing to surrender a part only of the land comprised in his title shall be made in writing to the Land Administrator in Form 12B, and shall be accompanied by —

(a) such fee as may be prescribed;

E (b) a plan showing the details of the proposal, together with such number of copies thereof as may be prescribed or, in the absence of any such prescription, as the Land Administrator may require;

(c) all such written consents to the making of the application as are required under paragraph (c) of sub-section (1) of section 196; and

F

(d) subject to sub-section (3), the issue document of title to the land.

(2) Upon receiving any such application, the Land Administrator shall endorse, or cause to be endorsed, a note thereof on the register document of title to the land.

G (3) An application under sub-section (1) may be submitted without the issue document of title if that document is in the hands of any person as chargee, or has been deposited with any person as security for a loan; but in any such case, the application shall be accompanied instead by a copy of a request by the proprietor, served on that person under sub-section (2) of section 244 or, as the case may be, sub-section (4) of section 281, for the production of the document at the Land H Office within fourteen days of the date thereof.

(4) In a case falling within sub-section (3), no action shall be taken on the application until the issue document, or a replacement thereof, is in the hands of the Land Administrator; and accordingly, if the document is not produced pursuant to the request referred to in that sub-section, or to any notice served under section 15 I on default in compliance with the request, title in continuation (or, where appropriate, a duplicate issue document only) shall be prepared under Chapter 3 of Part Ten as if the circumstances were as specified in paragraph (c) of sub-section (1) of section 166.

201 Procedure on applications

(1) Where any application under sub-section (1) of section 200 relates to land the surrender of which requires the approval of the State Director, the Land Administrator shall refer the application to him, together with his recommendations thereon.

(2) If on any application under the said sub-section the Land Administrator or, in a case referred to him as aforesaid, State Director is satisfied —

(a) (Deleted by Act A832).

(b) that the conditions specified in sub-section (1) of section 196 are fulfilled, and

(c) that approval ought not to be withheld on the grounds specified in sub-section (3) of that section,

he shall approve the surrender.

(3) In any other case, the Land Administrator or, as the case may be, State Director shall reject the application.

(4) On approving, or being informed by the State Director that he has approved, the surrender, the Land Administrator shall —

(a) revise (by reference to the estimated area of the part to be retained) the rent payable by the proprietor;

(b) notify the proprietor of the approval and the revised rent; and

(c) make, or cause to be made, a memorial of the surrender on the register and issue documents of title to the land.

(5) On rejecting, or being informed by the State Director that he has rejected, the application, the Land Administrator shall —

(a) notify the proprietor; and

(b) cancel, or cause to be cancelled, the note endorsed on the register document of title pursuant to sub-section (2) of section 200.

[51] It is clear that in order to be a valid surrender, the procedure under s 200 of the NLC must be complied with. With respect, we are of the view that the High Court and the majority in the Court of Appeal erred in law in reaching the decision that there was a valid surrender as the previous owners did not object to the construction of the retention pond and structures on the land. On the factual matrix of the present case as alluded to earlier in the judgment, there was no evidence to show that any of the procedures in ss 196, 200 and 201 of the NLC had been adhered to. There was no consent in writing from the person or body who has registered interest in the land (CIMB/chargee) as required by s 196(1)(c) read together with s 196(2)(a) of NLC.

[52] We would like to emphasis that the surrender of any private land must be made with the consent of both the registered proprietor and the State Authority and must be strictly complied with the relevant statutory provisions

of the NLC. We venture to say that these provisions are made for the purpose of safeguarding the interest of the registered proprietor. Where the procedures as stipulated by the provisions of the NLC are not adhered to, grave doubts are cast on the validity and/or legality of the surrender. In the absence of the consent of CIMB/chargee and by merely relying on the documents and/or letters produced by the respondents as enumerated in para [7] of this judgment, it cannot be assumed that all mandatory requirements under the provisions of the NLC had been adhered to when the State Authority gave its consent for the transfer.

[53] In the premises and consistent with the Torrens System that registration is everything, coupled with the fact that neither the previous owners nor the MBSA attempted to legalise the surrender pursuant to the procedure and provisions under the NLC, the second leave question must be answered in the negative.

DAMAGES FOR TRESPASS

[54] In the memorandum of appeal filed on 30 March 2021, one of the grounds stated as follows:

> ...
>
> 7. (Assuming that Subject Land Lot 18903 was the agreed lot to be surrendered to Majlis Perbandaran Shah Alam which is denied) the majority of the Court of Appeal had erred in fact and in law in failing to order that the Appellant is entitled to an order for an assessment of damages for the continuing presence of the Respondents' structures on the Subject Land Lot 18903 under Article 13 of The Federal Constitution (Rights to property) and/or Section 7(3) of the Government Proceedings Act 1956 (Savings of acts done in exercise of public duties). (Emphasis added.)

[55] The appellant in their written submission at para 9 had also prayed, inter alia, that:

> ...
>
> b) An order that the Defendants, jointly and/or severally, pay damages for trespass on the land known as Lot PT 18903 HS (M) 20109, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang ('Subject Land Lot 18903') or any part thereof from 25-3-2011 (date Plaintiff bought at auction) to the date the Defendants cease trespass (see relief (3) in Statement of Claim, Encl. 4, PDF page 152); ...

[56] The appellant submitted that they are entitled to damages, relying on art 13 of the Federal Constitution ('the Constitution'), and inter alia, on the High Court case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24 ('Terra Damansara').

[57] The principles that can be distilled from case of *Terra Damansara* may be summarised as follows:

(a) trespass to land is actionable per se without any proof of damage;

(b) continuing trespass will last so long as objects are inserted into the land and it gives rise to actions de die in diem — for so long as it lasts; and

(c) a trespass of this nature will only abate once the objects are removed. Successive actions will lie from day to day until the objects are removed and in each action damages are assessed up to the date of the action.

[58] Bearing in mind the above principles in the forefront our mind and considering that there is no valid surrender of the land to the state, we can safely conclude that there was indeed trespass on the land by the continuing presence of the respondents' structures. The corollary issue is this: on what date the action of trespass arises. In the statement of claim, the appellant is claiming from the date when the land was bought at the auction or a date this court deems fit, as follows:

> ...
>
> (3) An order that the Defendants, jointly and/or severally, pay damages for trespass on the land known as Lot PT 18903, HS(M) 20109, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang, or any part thereof *from 25.3.2011 or a date this Court deems fit* to the date the Defendants cease trespass; ... (Emphasis added.)

[59] In order to determine the date when the action of trespass arises, it is pertinent to refer to the chronology of the facts of this case as established in the High Court. These can be captured in the following paragraphs:

> [4] The Plaintiff had on 25.3.2011 purchased the Land at a public auction held by the Klang Land Office. The public auction was held on the application of the chargee bank, CIMB Bank Berhad. According to the proclamation of sale dated 25.3.2011, there was a retention pond on the Land and nothing stated therein that any part of the Land was surrendered or ought to be surrendered and no registered interest was stated on the Land. The Plaintiff conducted a land search which does not show that the portion of the Land where the retention pond and the structure were built was surrendered to the Defendants. The Plaintiff was then the successful bidder and subsequently purchased the Land for RM3.66 million. After the auction, the Plaintiff carried out another land search on 4.5.2011 which also does not show that the portion of land where the retention pond and the structures were built was never surrendered to the Defendants.
>
> [5] However, sometime on or about *July 2011*, the Plaintiff engaged PW2, a licensed land surveyor to carry out a survey on the Land and it revealed that the retention pond was on the Land. There were also the structures, such as TNB, staff quarters, huts and store room surrounding the retention pond which part of the Land, ie being 9.554 acres out of 17.49 acres. PW2 also confirmed that the certified plan of the Land with the Department of Survey and Mapping Malaysia showed

that the retention pond was part of the land and the Defendants had fenced up and erected the structures next to the retention pond. *The Plaintiff's agents wrote to, inter alia, the first and second Defendants requesting for information and documents justifying the latter's occupation of the Land.*

[6] By way of a letter dated 25.10.2013, the first Defendant replied to the Plaintiff's letter dated 27.9.2013 stating that they are in the process of collecting the relevant documents/information on the project and the retention pond on the Land and that a meeting to discuss this matter will be held once the relevant documents/information obtained. Subsequently, by the letter dated 11.9.2014, the first Defendant wrote to Klang Land Administrator to apply to enter a Registrar Caveat on the Land and the caveat was entered on 19.9.2014.

[7] On 10 December 2014, the Plaintiff filed an application in the Shah Alam High Court via Originating Summons No. 24-1381-12/2014 against the first and second Defendants for discovery and to provide necessary documents to justify their occupation on the Land and this was allowed by the Court on 23 July 2015.

[8] On 11.03.2015, the Defendants lodged a police report No. SEK9/002493/15 stating that they were unable to locate the project file namely 'Projek Rancangan Tebatan Banjir Taman Sri Muda Seksyen 25 Shah Alam' and intended to gather documents and plan from Majlis Bandaraya Shah Alam (MBSA).

[9] The first and second Defendants then produced the documents below:

(a) A copy of official search and Form 11B for the Land (page 63-66 Bundle B);

(b) Letter dated 16.09.1996 by Newacres Sdn Bhd to MBSA (page 70 Bundle B);

(c) Site Plan, Location Plan and Source Plan (page 71 Bundle B);

(d) Layout Plan dated 8 June 2006 (page 74 Bundle B).

[10] Notwithstanding the above, *the Plaintiff's solicitors wrote to the first Defendant by letter dated 16.03.2017 asking for irrevocable and unconditional undertaking among others for the delivery of vacant possession of the Land and removal of the fence and structures within three days.* The Plaintiff then proceeded with filing of this suit on *20.03.2017*. The Defendants filed an application for striking out under Order 18 Rule 19 Rules of Court 2012 on 26.10.2017 but later withdrawn to proceed with the trial. (Emphasis added.)

[60] As can be discerned from narration of the facts above, after the date of purchase of the land at auction, the appellant engaged in some sort of negotiation with the respondents regarding the justification of the respondents' occupation of the land. The appellant issued a letter of demand dated *16 March 2017* requiring the respondents to deliver vacant possession and to removal of structures on the land within three days therefrom. We conclude, therefore that the action of trespass only occurred on 20 March 2017 (the date the respondent neglected and/or failed to vacate the land (see *ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor* [2020] MLJU 516).

LIMITATION PERIOD

[61] In our opinion, the issue of limitation period has no role to play at all in our Torrens System. Section 341 of the NLC provides:

> 341 Adverse possession not to extinguish titles or interests
>
> *Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein,* and accordingly, the Limitation Act 1953, shall in no circumstances operate to extinguish any title to, or interest in, land. (Emphasis added.)

[62] Our view is fortified by the authoritative text book, *National Land Code, A Commentary, Vol 2* (2019 Desk Ed, Judith Sihombing, LexisNexis) pp 1730–1732:

> [542] Adverse possession refers to the common law principle under which the [sic] title of the proprietor of land or of an interest therein will be extinguished where that land or interest has been in the possession of another for a period specified in the appropriate limitations legislation, and where such possession was without right or title. At the end of the relevant statutory period the true owner loses all right to take action for recovery of his land or interest and corresponding to his loss is an enhancement in the adverse possessor enabling him to claim the title or interest as his. However adverse possession could not be obtained through the principle of tracking claims to personal interests onto adverse possession claims; see *Yau Day Ching & Anor v Tan Kian Lai* [2011] 9 MLJ 737 where a party unsuccessfully sought to rely on the prior entry of a licensee as part of a claim to the land under succession
>
> The section clearly provides that there can be no adverse possession under the Code either against the land of a registered proprietor (s 341) or against the Government (s 48) The rationale for excluding adverse possession against the registered proprietor under the Torrens system is said to rest on the concept that it would conflict with the fundamental principle of indefeasibility 'by allowing ownership to be proved by evidence of physical occupation': *Jamir Hassan v Kong Min* [1992] MLH 46 per Haidar J at 54.
>
> ...
>
> [549] The effect of the section is then to disentitle any adverse possessor from gaining title or interest to land. It preserves the rights of the owner or interest-holder over the land or interest so that such a person is in no danger from loss no matter how long an adverse possessor is in possession. This is not to say that the occupation may be under some estoppel which may have some effect under section 206(3).

[63] In the result, we say the appellant stands a right to be awarded damages for trespass on the land from 20 March 2017.

A CONCLUSION

[64] For the foregoing reasons, we would answer both of the questions of law posed for our determination in the negative. Consequently, we would allow the appeal with costs and set aside the decision of the Court of Appeal. We would affirm the decision and the orders made by the minority of the Court of Appeal.

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Appeal allowed.

Reported by Ashok Kumar

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